

REMARKS

Applicant thanks the Examiner for the thorough consideration given the present application, but hereby requests reconsideration and withdrawal of the Final Office Action dated August 26, 2009 as being premature and for failing to comply with Examination practice as established in MPEP § 706.07(a).

The “Final” Office Action

Applicant filed a reply to the previous Office Action on May 11, 2009, amending independent claims 38-41 and 50, and providing no amendment at all to claims 90-98, including no amendment to independent claims 90 and 91. Responsive thereto, the Examiner issued a Final Office Action dated August 26, 2009, presenting new prior art and making new prior art rejections to many of the claims of record, including claims 90-98. It is noted that unamended claims 90-98 had been rejected upon different references in the prior Office Action, but Applicant had made no amendment thereto because amendments were not deemed necessary to avoid the prior art.

Practice Regarding Final Rejections on Second Action

MPEP § 706.07(a) specifically directs that a second Office Action will be made a Final Office Action, “except where the examiner introduces a new ground of rejection that is neither necessitated by applicant’s amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c)”. Thus, because there was no amendment to claims 90-98 and because the new rejection was not based on prior art cited in an IDS, the Office Action dated August 26, 2009 cannot be made final under the practice established in this section of the MPEP.

Interview Summary

Responsive to receipt of the Office Action dated August 26, 2009, Applicant noted that the Final Office Action included new prior art rejections to claims which had not been amended, and Applicant’s representative Paul T. Sewell called Examiner Steven Marsh to request that the

Final Office Action be withdrawn because it was premature, and to issue a new Office Action in accord with Examination practice established in MPEP §§ 706.07(a), 706.07(c) and 706.07(d). During the telephone Interview on September 15, 2009, Examiner Marsh graciously agreed that the Final Office Action was premature, and agreed to withdraw the final Office Action and issue a new Office Action on the merits within the shortened statutory period set in the Office Action. He further indicated that the new Office Action would probably be based on the newly cited prior art. Applicant and Applicant's representative appreciate Examiner Marsh's willingness to discuss the issue and most importantly his indication that he would withdraw the premature Final Office Action and vacate the shortened statutory period set therein, and issue a new Office Action. This constitutes Applicant's statement of the summary of the Interview.

Request to Withdraw the Premature Final Office Action

MPEP §§ 706.07(c) and 706.07(d) establish that as a matter of practice Applicant may question the prematurity and request withdrawal of a Final Rejection "wholly distinct from the tenability of the rejection." This paper is filed on that basis.

Because the Final Office Action dated August 26, 2009 was issued contrary to Examination practice established in MPEP § 706.07(a), this Office Action was a Premature Final Rejection, as Examiner March indicated in the Interview referenced above. Accordingly, Applicant requests reconsideration and withdrawal of the premature Office Action and the issuance of a new Office Action in accord with proper Examining practice established by the MPEP, prior to the expiration of the statutory period set in the "Final" Office Action as required by MPEP § 706.07(d).

Conclusion

All rejections raised in the Office Action having been properly traversed and addressed, Applicant therefore respectfully requests that the Examiner reconsider all presently outstanding rejections and that the premature Final Office Action be withdrawn. It is believed that a full and complete response has been made to the outstanding Office Action.

Prompt and favorable consideration of this Amendment is respectfully requested.

If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone Paul T. Sewell, Registration No. 61,784, at (703) 205-8000, in the Washington, D.C. area.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.14; particularly, extension of time fees.

Dated: October 15, 2009

Respectfully submitted,

By 

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